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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10

11 MARCIANO PLATA, et al.,

12 *Plaintiffs,*

13 v.

14 ARNOLD SCHWARZENEGGER, et al.,

15 *Defendants.*  
16  
17

Case No. C01-1351 TEH

**RECEIVER'S SUPPLEMENTAL  
APPLICATION NO. 8 FOR ORDER  
WAIVING STATE CONTRACTING  
STATUTES, REGULATIONS AND  
PROCEDURES**

18 INTRODUCTION

19 Receiver J. Clark Kelso ("Receiver") submits this Supplemental Application No. 8 for an  
20 order waiving, to the extent necessary, any requirement that the Receiver comply with State  
21 statutes, rules, regulations and/or procedures, governing the notice, bidding, award and protests  
22 with respect to contracts ("State Contracting Procedures"), so as to permit the Receiver to extend  
23 and modify an existing contract with Health Management Associates ("HMA"), the purpose of  
24 which is to analyze, design and implement quality improvement programs to eliminate  
25 preventable suffering and deaths, including specifically pilot projects for preventing suffering  
26 and deaths from diabetes and Hepatitis C. Pursuant to this Court's Order, dated January 25, 2008  
27 (Docket # 1066), waiving State Contracting Procedures, HMA is currently under contract with the  
28 Receiver and has assisted in the development and implementation of a quality improvement

1 program focused on preventing suffering and death from asthma. In the January 25 Order, this  
 2 Court required the Receiver to submit separate applications with respect to new or additional  
 3 quality improvement initiatives. This Application is intended merely to apply the waiver in the  
 4 January 25 Order so as to permit the Receiver to extend and modify the existing contract with  
 5 HMA.

6 The Receiver makes this Application on the grounds that if he were required to comply  
 7 fully with existing State Contracting Procedures, he would be unreasonably constrained in his  
 8 ability to accomplish the goals the Court has set for him. In order for the Receiver to fulfill in a  
 9 timely fashion the charge this Court has given him, the Receiver requires the waiver requested in  
 10 this Application so that he is not hampered by the same bureaucratic procedures that have  
 11 prevented the State itself from solving the problems of the California prison medical delivery  
 12 system.

13 In compliance with this Court's January 25 Order, the Receiver requested a stipulation  
 14 from the parties with respect to this Supplemental Waiver Application No. 8. Plaintiffs' counsel  
 15 agreed to so stipulate. Defense counsel declined to stipulate, but indicated that defendants had  
 16 no objection to entry of an order continuing the waiver of State Contracting Procedure to permit  
 17 the extension of the quality improvement projects which are the subject of this Application.  
 18 Declaration of Martin H. Dodd, filed herewith, ¶¶ 2-3. Absent such a stipulation, the Receiver  
 19 has submitted this Application.

## 20 **FACTUAL BACKGROUND**

### 21 **A. Appointment of the Receiver.**

22 In the face of the unprecedented and ongoing crisis in the California prison health care  
 23 system and the apparent inability of the State to address that crisis, on February 14, 2006, this  
 24 Court appointed the Receiver and gave him a mandate to move forward expeditiously to remedy  
 25 the deficiencies in the system. The Court vested in the Receiver the duty to control, oversee,  
 26 supervise and direct all administrative, personnel, financial, accounting, contractual, legal and  
 27 other operational functions of the medical delivery component of the California Department of  
 28 Corrections and Rehabilitation ("CDCR"). In addition to those very broad powers, this Court

1 established a procedure by which the Receiver could request waivers of State laws and contracts  
2 when necessary for him to accomplish his work.

3 In the event, however, that the Receiver finds that a state law, regulation, contract,  
4 or other state action or inaction is clearly preventing the Receiver from developing  
5 or implementing a constitutionally adequate medical health care system, or  
6 otherwise clearly preventing the Receiver from carrying out his duties as set forth  
7 in this Order, and that other alternatives are inadequate, the Receiver shall request  
8 the Court to waive the state or contractual requirement that is causing the  
9 impediment.

10 Order Appointing Receiver ("Order"), filed February 14, 2006, p. 5:4-9.

11 **B. Receiver's Master Application for a Waiver of State Contracting Law.**

12 On April 17, 2007, the Receiver filed a master application for an order (1) waiving any  
13 requirement that the Receiver comply with State Contracting Procedures with respect to the  
14 contracts necessary to implement certain projects described therein; and (2) approving substituted  
15 notice, bidding and contract award procedures for such projects (the "Master Application"). In  
16 that Master Application, the Receiver set out in some detail the complex web of State  
17 Contracting Procedures impeding his ability to fulfill his court-ordered mandate to provide  
18 constitutional medical care to the State's prisoners, and his proposed process to streamline those  
19 procedures to accomplish the goals the Court has set out for him. The Master Application was  
20 designed to thoroughly address the legal and factual rationale for waivers of State Contracting  
21 Procedures in the context of this receivership, and to permit subsequent follow-up waiver  
22 applications (such as this one) without the need to repeat such rationale. Master Application,  
23 p. 3:11-15.

24 **C. The Receiver's Supplemental Waiver Application No. 2, The Court's January 25,  
25 2008 Order Granting In Part And Denying In Part That Application And The  
26 Receiver's Attempt To Obtain A Stipulation Of The Parties With Respect To This  
27 Supplemental Waiver Application.**

28 On November 20, 2007, the Receiver submitted his Supplemental Application No. 2 for  
an Order Waiving State Contracting Statutes, Regulations, and Procedures and Approving  
Receiver's Substitute Procedure for Bidding and Award of Contracts ("Supplemental Application  
No. 2"). Supplemental Application No. 2 concerned the Receiver's quality improvement Access-

1 to-Care projects, including specifically the Asthma Initiative, which was designed to eliminate  
2 preventable deaths due to undiagnosed or uncontrolled asthma.

3 On January 25, 2008, the Court entered its Order granting in part and denying in part  
4 Supplemental Application No. 2. In the January 25 Order, the Court waived State contracting  
5 law, regulations and procedures to the extent necessary to permit the Receiver to undertake the  
6 first quality improvement project, focused on asthma, but denied Supplemental Application No.  
7 2 without prejudice to the extent that it sought to apply to unspecified future, as yet unspecified,  
8 quality improvement projects. The Court ruled that “[s]hould the need for a waiver arise once  
9 the Receiver develops the contemplated quality improvement projects, the Court will re-evaluate  
10 an application for a waiver at that time. To reduce inefficiency, the Receiver shall attempt to  
11 seek a stipulation from the parties before filing any further supplemental applications for waivers  
12 of state law.” Docket # 1066, p. 3.

13 As indicated above, the Receiver obtained plaintiffs’ stipulation and attempted, but failed,  
14 to procure the stipulation of defendants with respect to this Application. Defendants did,  
15 however, express that they had no opposition to the relief requested.

16 **D. Description Of The Projects That Are The Subject Of This Supplemental**  
17 **Application.<sup>1</sup>**

18 Following entry of the January 25 Order, the Receiver entered into a contract with HMA  
19 for technical assistance, education and training, and evaluation services for the purpose of  
20 developing and implementing the quality improvement program, with an initial focus on asthma.  
21 Working with HMA, the Receiver’s staff brought together teams from six pilot prisons to share  
22 their ideas and experience, using a chronic care redesign model known as a “learning  
23 collaborative.” In November 2008 the six pilot sites completed the last of four “collaborative  
24 learning sessions.” Their performance in implementing the chronic care model and in taking  
25 advantage of the collaborative approach far exceeded expectations.

26 The teams from these six pilot facilities have begun to develop the knowledge, skills, and  
27 strategies that will enable them to redesign care for patients with any chronic disease, including:

28 <sup>1</sup> The facts set forth herein are based on the Declaration of Dr. Terry Hill, M.D., filed herewith.

- a. A new organizational framework of team-based, patient-centered coordinated care with unambiguous responsibility for individual patient outcomes;
- b. Proven methods for continuously improving the processes of care;
- c. Evidence-based standards of chronic disease care;
- d. A new and powerful information system support tool, the chronic disease patient registry; and,
- e. The ability to identify the sickest and most complicated of the chronically ill patients who can receive focused case management.

To leverage the knowledge and expertise developed by the chronic care teams, the Receiver's current plan is that, beginning in January 2009, the chronic care team and leaders from the six pilot sites will work with HMA to disseminate the chronic disease model and to create the local improvement teams at the remaining 27 prisons, specifically with respect to asthma. In addition, the six pilot sites will add two additional chronic diseases, diabetes mellitus and hepatitis C, to their programs. The Receiver has chosen these two diseases because of their high prevalence in the inmate-patient population, because they have serious potential to cause suffering and death, and because there are known standards which should guide care. As with asthma, the experience of these six pilot sites will serve as the basis for the change packages and strategies to be used for dissemination to the remaining 27 prisons later in 2009.

By the end of 2009, all prisons will have trained local leadership in chronic care, and all will have implemented the patient-centered, team-based chronic care model appropriate for managing any chronic illness using evidence-based, standardized processes and measurements. As Dr. Hill emphasizes in his accompanying declaration, the speed and scope of the proposed 2009 initiatives exceed industry standards even among the highest-performing and most richly-endowed healthcare delivery systems.

As a result of the demonstrated success of the Access-to-Care pilot focusing on asthma, and the importance of HMA to that success, the Receiver believes that continued progress at the pace anticipated requires continued HMA expertise and leadership. Because both the January 25 Order and HMA's contract were focused on asthma, the addition of diabetes and hepatitis C to

1 the Access-to-Care Initiative program will require modifications to and extensions of HMA's  
 2 contract. Thus, this Supplemental Application seeks an Order waiving State contracting law and  
 3 procedure to the extent that such a waiver may be necessary to permit the Receiver to modify and  
 4 extend HMA's existing contract to assist in the implementing the Access-to-Care program with  
 5 respect to the two additional diseases.

6 **E. Good Cause Exists To Waive State Contracting Law And Procedures For The**  
 7 **Above-Referenced Projects To Ensure That Receiver Can Achieve His Court-**  
 8 **Ordered Mandate To Provide Constitutional Medical Care To The State's**  
 9 **Prisoners.**

10 As set forth in Receiver's Master Application, the State Contracting Procedures are  
 11 complex, cumbersome and extremely time-consuming and have had a real, day-to-day and very  
 12 serious adverse impacts on the CDCR's ability to provide adequate medical care in its prisons  
 13 and on the Receiver's ability to implement necessary, timely, and inter-related remedial  
 14 measures. The Receiver submits that, on its face, State Contracting Procedures are much too  
 15 slow, much too bureaucratic and insufficiently nimble to accommodate the Receiver's efforts to  
 16 bring the projects described to fruition or to make meaningful change to the prison healthcare  
 17 system in a timely fashion.

18 This Court has found that the process by which State contracts are developed, reviewed,  
 19 bid and awarded contributes to and exacerbates the numerous failings in the prison health care  
 20 system. *See* FFCL at pp. 26-27. In the June 4, 2007 Order, the Court noted that "[t]here is no  
 21 dispute that it would effectively stymie the Receiver's efforts to implement the projects identified  
 22 in his [Master] Application in a timely manner if full compliance with the State's traditional  
 23 contracting processes were required." June 4, 2007 Order at p. 3:18-20. Based on the Receiver's  
 24 showing in the Master Application, the Court granted a waiver of State Contracting Procedures  
 25 for those projects listed in Receiver's Master Application in the June 4, 2007 Order.

26 For the same reasons, the Court should grant this Supplemental Application No. 8. As  
 27 with the proposed contract to pursue the asthma pilot portion of the Access-to-Care Initiative,  
 28 State contracting procedures, if required to be followed with respect to the proposed additional  
 quality improvement projects, would interfere with or impede the Receiver in the performance of



1 his duties. In light of HMA's experience, the success achieved and the aggressive time frame  
 2 within which the Receiver intends to implement the next phase of the Access-to-Care Initiative,  
 3 it would be detrimental to the Receiver's goals if he were required to follow State contracting  
 4 procedures and/or seek new or additional contractors to assist in the process. Accordingly, the  
 5 Receiver believes that no adequate alternative to the proposed waiver of State contracting  
 6 procedures exists.

### 7 CONCLUSION

8 For all the foregoing reasons, the Receiver requests that, to the extent necessary and  
 9 required, the waiver of State Contracting Procedures provided for in the January 25 Order be  
 10 made equally applicable to any extension and amendment of the HMA contract necessary to  
 11 permit the Receiver to pursue his quality improvement projects pertaining to diabetes and  
 12 Hepatitis C, as described more fully above and in the Declaration of Terry Hill, filed herewith.

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 14  
 15 Dated: January 9, 2009

FUTTERMAN & DUPREE LLP

16  
 17 By: /s/  
 18 Martin H. Dodd  
 19 Attorneys for Receiver J. Clark Kelso  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies as follows:

I am an employee of the law firm of Futterman & Dupree LLP, 160 Sansome Street, 17<sup>th</sup> Floor, San Francisco, CA 94104. I am over the age of 18 and not a party to the within action.

I am readily familiar with the business practice of Futterman & Dupree, LLP for the collection and processing of correspondence.

On January 9, 2009, I served a copy of the following document(s):

**DECLARATION OF RECEIVER J. CLARK KELSO REGARDING  
COORDINATION AGREEMENT FOR TRANSITION, ACTIVATION AND  
MANAGEMENT OF 10,000 BED PROJECT**

by placing true copies thereof enclosed in sealed envelopes, for collection and service pursuant to the ordinary business practice of this office in the manner and/or manners described below to each of the parties herein and addressed as follows:

— BY FACSIMILE: I caused said document(s) to be transmitted to the telephone number(s) of the addressee(s) designated.

X BY MAIL: I caused such envelope(s) to be deposited in the mail at my business address, addressed to the addressee(s) designated below. I am readily familiar with Futterman & Dupree's practice for collection and processing of correspondence and pleadings for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business.

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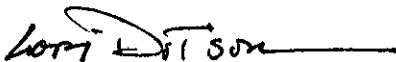
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19 I declare that I am employed in the offices of a member of the State Bar of this Court at  
20 whose direction the service was made. I declare under penalty of perjury, under the laws of the  
21 united State of America, that the above is true and correct.

22 Executed on January 9, 2009 at San Francisco, California.

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Lori Dotson